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CITATIONS

Cases:

Constitutional provisions, statutes, and regulations—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES OF AMERICA, APPELLANT

v.

STATE TAX COMMISSION OF THE
STATE OF MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge district court (App. A, *infra*, pp. 1a-36a) is not yet reported.

JURISDICTION

The judgment of the three-judge district court (App. B, *infra*, pp. 37a-38a) was entered on July 12, 1974. A notice of appeal to this Court (App.

C, *infra*, pp. 39a-40a) was filed on August 8, 1974. On October 1, 1974, Mr. Justice Powell extended the time for docketing the appeal to and including November 6, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATION INVOLVED

The relevant provisions of the United States Constitution, the Buck Act, the Mississippi Local Option Alcoholic Beverage Control Law, and Regulation 25 of the Mississippi State Tax Commission are set forth in App. F, *infra*, pp. 65a-69a.

QUESTIONS PRESENTED

A regulation of the Mississippi State Tax Commission requires out-of-state liquor distillers and suppliers to collect a "wholesale markup" on liquor sold to military officers' clubs and other nonappropriated fund activities located on military bases within Mississippi and to remit this "markup" to the Tax Commission. The questions presented are:

1. Whether the Mississippi regulation imposes an unconstitutional state tax on instrumentalities of the United States.

2. Whether the consent of the United States under the Buck Act to the imposition of state sales taxes on sales occurring within exclusively federal enclaves is inapplicable under the terms of that Act because

Mississippi's tax is imposed upon instrumentalities of the United States.

3. Whether the regulation is invalid because it conflicts with federal procurement regulations and policies.

STATEMENT

This case is here for the second time. It presents important legal issues that this Court found it unnecessary to resolve in the prior appeal in *United States* v. *State Tax Commission of the State of Mississippi*, 412 U.S. 363.

The material facts are not in dispute.[1] Prior to 1966, Mississippi prohibited the sale or possession of alcoholic beverages. In that year, it adopted a local option alcoholic beverage control law which provides that the State Tax Commission is the sole importer and wholesaler of alcoholic beverages. 7A Miss. Code 1942 Ann. (1972 Cum. Supp.) 10265-01, *et seq.* The Commission is authorized to sell to retailers in the state "including, at the discretion of the Commission, any retail distributors operating within any military post * * * within the boundaries of the State, * * * exercising such control over the distribution of alcoholic beverages as seem [*sic*] right and proper in keeping with the provisions and purposes of this act." 7A Miss. Code 1942 Ann. (1972 Cum. Supp.) 10265-18(c). The statute directs the Commission to add to the cost of alcoholic beverages a

[1] The case was submitted on a stipulation of facts (App. D, *infra*, pp. 41a-61a).

"markup" which in its judgment would be adequate to cover the cost of wholesaling, to provide a reasonable profit, and to render prices competitive with those in neighboring states. 7A Miss. Code 1942 Ann. (1972 Cum. Supp.) 10265-106.

Pursuant to this statute, the Commission promulgated Regulation 25 (originally numbered 22), which authorizes military post exchanges, ship stores, and officers' clubs to purchase liquor either from the Commission or directly from distillers. On direct purchases by such military facilities, the regulation requires that distillers collect and remit to the Commission the "usual wholesale markup" charged by the Commission on its own sales to retailers. During the period in issue, the wholesale markup was 17 percent on distilled spirits and 20 percent on wine.

The officers' and noncommissioned officers' clubs and other nonappropriated fund activities on the four military bases in Mississippi had purchased liquor from out-of-state distillers and suppliers when Mississippi was a "dry" state, and they decided to continue this practice rather than purchase from the Commission (App. D, *infra*, p. 53a). Two of these bases, Keesler Air Force Base and the Naval Construction Battalion Center, are federal enclaves; exclusive jurisdiction over these lands was ceded to the United States by Mississippi, which retained only the right to serve civil and criminal process there (3A Miss. Code 1942 Ann. 4153, 4154). On the other two bases, Columbus Air Force Base and Meridian Naval Air Station, the federal government and

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ate exercise concurrent jurisdiction (App. D, p. 43a).

n after the Mississippi regulation became effec- he military authorities commenced discussions state officials in an unsuccessful effort to per- them that the collection of the "markup" was per. The military authorities also attempted y the amounts for the markup into an escrow until the matter could be judicially determined. Commission, however, notified the distillers that y did not remit the markups on their military to the Commission, the distillers would be sub- criminal prosecution (see 7A Miss. Code 1942 (1972 Cum. Supp.) 10265-112) and to delist- .e., loss of the privilege of selling to the Com- on for retailing in Mississippi (App. D, *infra*, 3a-56a). To obtain liquor, therefore, the mili- facilities were required by the distillers to pay arkup. By July 31, 1971, $648,421.92 had been under protest to suppliers outside Mississippi ich markups (*id.* at 57a).

e United States instituted this action on Novem- 1969, seeking a declaration that the regulation constitutional, an injunction against its contin- enforcement, and a judgment for the amount dy paid for markups.

e three-judge district court, convened pursuant 8 U.S.C. 2281, granted summary judgment st the government. It held that the constitu- l grants of authority to Congress to establish regulate military forces and to exercise juris-

diction over lands belonging to the United States "are diminished by the express prohibition of the Twenty-first Amendment as to all packaged liquor transactions which (1) are made on exclusively federal enclaves but without restriction upon use and consumption of such liquors outside the base, or (2) take place on military installations over which the state and federal government exercise concurrent jurisdiction" (340 F. Supp. 903, 904). The court did not address the government's other contentions that the regulation imposes an unconstitutional tax upon federal instrumentalities and impermissibly interferes with federal procurement regulations and policy.

On direct appeal, this Court vacated the district court's judgment and remanded the case for further proceedings (412 U.S. 363). It held that "the District Court erred in concluding that the Twenty-first Amendment provides the State with sufficient authority over liquor transactions to support the application of the Regulation to the two bases over which the United States exercises exclusive jurisdiction" (*id.* at 368, fn. omitted). The Court declined to reach the issues that the district court did not address. "[W]e believe it would be useful to have the views of the District Court on these additional arguments, and we therefore remand the case to the District Court to allow it to consider initially the Government's instrumentality and Supremacy Clause arguments" (*id.* at 381).[2]

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[2] The Court also declined to rule on the State's contention that the United States has consented under the Buck Act,

On remand, the three-judge district court again entered a judgment dismissing the government's complaint (App. B, *infra*, pp. 37a-38a). It held, with respect to liquor sales by out-of-state distillers to military facilities on the exclusive federal enclaves, that the State's markup requirement is a "sales or use tax" to which the United States has consented under Section 105(a) of the Buck Act, 4 U.S.C. 105(a) (App. A, *infra*, p. 9a). Although it recognized that the State regulation by its own terms requires the out-of-state distiller "both to collect [the markup] from the military purchaser and pay it over to the State" (*id.* at 18a), the court ruled that the tax is not on an instrumentality of the United States within the meaning of the Buck Act's exception in 4 U.S.C. 107(a). It held that the "legal incidence" of the tax—which it defined as "the legally enforceable, unavoidable liability for nonpayment of the tax" (*ibid.*)—falls upon the distiller, because the distiller is free to absorb the economic burden of the markup and "[t]he purchaser-vendee is not le-

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4 U.S.C. 105-111, to the imposition of the "markup" tax on sales to military facilities on the two exclusive jurisdiction bases. "Having found that the District Court erred in the basis on which it did dispose of this case," this Court decided to leave "for determination by that court in the first instance on remand" the issues "[w]hether the markup should be treated as a tax on sales occurring within a federal area within the meaning of [4 U.S.C.] § 105(a), see also 4 U.S.C. § 110(b), and, if so, whether the exception contained in § 107(a) nevertheless serves to remove the markup from the consent provision for purposes of the two exclusively federal enclaves" (412 U.S. at 379).

gally or otherwise obligated to the Commission or the State for payment of the markup" (*id.* at 21a).

The district court disposed of the government's constitutional tax immunity argument on the same ground: the markup is not an unconstitutional tax on federal instrumentalities, because the legal incidence of the tax falls on the distiller, not on the military purchasing facilities (*id.* at 27a).

Finally, the court held that, "[s]ince the markup applies prorata to all wholesale liquor transactions, it does not alter the [military] vendee's competitive purchase equation and thus is incapable of interfering in any substantial way with the armed forces' policy of competitive liquor procurement under 'the most advantageous contract, price and other factors considered'" (*id.* at 33a-34a). Although the State regulation "may reduce the military's profit margin from retail liquor sales," "[t]he slight weight of this economic factor does not tip the balance in favor of a military exemption from the reach of the XXI Amendment" (*id.* at 35a). Like its ruling on the tax issues, the court's decision on the military procurement issue rests on its view that, under the Mississippi regulation, "[o]nly the vendor, in his individual capacity, is subject to state control" (*ibid.*).[3]

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[3] This aspect of the district court's opinion apparently applies only to the bases over which the United States and Mississippi exercise concurrent jurisdiction. The court believed that its resolution of the Buck Act issue with respect to the exclusively federal enclaves made it unnecessary to reach the military procurement issue as it affects those bases (App. A, *infra*, pp. 25a-26a, n. 21). But see note 8, *infra*.

THE QUESTIONS ARE SUBSTANTIAL

The district court erroneously decided substantial constitutional issues involving the proper accommodation of state authority under the Twenty-first Amendment, on the one hand, with government immunity from state taxation and federal control of military procurement, on the other hand. The resolution of these issues—left undecided by this Court in its prior opinion in this case—has significant practical importance not only in Mississippi, which by 1971 had already collected more than $648,000 pursuant to the contested regulation, but also in other states that might follow Mississippi's lead in attempting to regulate and tax the purchase of liquor by federal instrumentalities for sale in federal enclaves or on military bases.

1. The district court's error with respect to the federal tax immunity and Buck Act issues lies in its determination that the "legal incidence" of the State's tax falls on the out-of-state distiller and not on the military purchasing facility. That determination itself rests on a definition of legal incidence—"the legally enforceable, unavoidable liability for nonpayment of the tax" (App. A, *infra*, p. 18a)—which this Court rejected in *First Agricultural National Bank* v. *State Tax Commission*, 392 U.S. 339, a decision that we believe controls the present case.

The Court there invalidated a Massachusetts sales tax as applied to purchases of tangible personal property by a national bank. One of the issues was

whether the statute imposed the sales tax upon the bank as a purchaser or upon its vendors. The state court had held, as the district court held in the present case, that "[t]he legal incidence of a tax [is] * * * determined by 'who is responsible * * * for payment to the state of the exaction" (229 N.E. 2d 245, 249) and that under that test the legal incidence of the tax fell upon the vendor, not the purchaser.

This Court rejected the state court's reliance upon legal liability as the test of legal incidence. "It would appear to be indisputable that a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser" (392 U.S. at 347).

Like the Mississippi regulation in this case, the Massachusetts statute required the vendor to add the tax to the sales price, collect it from the purchaser, and remit it to the State.[4] This Court accord-

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[4] Mississippi's Regulation 25 provides that direct orders from military facilities "shall bear the usual wholesale markup," that "[t]he price of such alcoholic beverages shall be paid by such organizations directly to the distiller," and that the distiller "shall in turn remit the wholesale markup" to the State (App. F, *infra*, p. 69a). The State Tax Commission also informed alcoholic beverage suppliers by letter that "[t]he mark-up regulatory fee * * * must be invoiced to the Military and collected directly from the Military" and that "[a]ny supplier who ships or sells alcoholic beverages to Military organizations located within the boundaries of Mississippi without * * * collecting said fee directly from the said Military organization shall be in violation" of the statute and regulation (App. D, *infra*, pp. 55a-56a).

ingly viewed the statute as establishing "a clear requirement that the sales tax be passed on to the purchaser" (*ibid.*). It rejected the state court's reasoning—embraced in substance by the district court in the present case—that "simply because there is no sanction against a vendor who refuses to pass on the tax * * *, this means the tax is on the vendor" (*id.* at 348).[8]

It is true that the Massachusetts statute, unlike the Mississippi regulation, prohibited vendors from advertising that they would absorb the sales tax. But that was not a decisive consideration in this Court's view of the case. What the Court considered "controlling" was that "the Massachusetts Legislature intended that this sales tax be passed on to the purchaser" (*ibid.*). "[I]t seems clear to us that the force of the law * * * is such that, regardless of sanctions, businessmen will attempt, in their everyday commercial affairs, to conform to its provisions as written" (*ibid.*).

The legal incidence of Mississippi's wholesale markup, like Massachusetts' sales tax, falls on the purchaser, not the seller. The regulatory intent here is that the markup charge be passed on to the military

[8] The district court stated, in support of its conclusion that the legal incidence of the Mississippi tax is on the out-of-state distiller, that "[t]he vendor may fix the price at which he sells altogether free of any state control or restraint" and that "Mississippi's ABC Act and regulations do not impose any sanctions on the vendor if he absorbs all or any portion of the markup's economic burden" (App. A, *infra*, pp. 20a, 21a). But see note 4, *supra*.

purchasing facility. Regulation 25, as construed by the Tax Commission itself in a letter to liquor suppliers, requires that "the mark-up regulatory fee * * * be invoiced to the Military and collected directly from the Military" (App. D, *infra*, pp. 55a-56a). Although the district court believed that no sanction would be imposed on a distiller who determined to absorb the markup rather than collect it from the military (App. A, *infra*, p. 21a), the same Tax Commission letter stated that "[a]ny supplier who ships or sells alcoholic beverages to Military organizations * * * without * * * collecting [the markup] fee directly from the said Military organization shall be in violation" of the statute and regulation and therefore subject to criminal and civil sanctions (App. D, *infra*, p. 56a).

Moreover, had the district court been correct in its belief that no sanction would be imposed on a distiller for absorbing the markup, this Court's decision in *Agricultural Bank* makes clear that the absence of a sanction for a vendor's absorbing a tax does not mean that the tax is upon the vendor (392 U.S. at 348). It is the intention of the legislature, or, as here, the regulatory agency, that determines the legal incidence of the tax. The Tax Commission's intention, as reflected in its regulation and interpretive letters, is that the distillers should pass on the markup. As in *Agricultural Bank*, therefore, it is reasonable to assume that, "regardless of sanctions, businessmen will attempt, in their everyday commercial affairs, to conform to [the regulation] as writ-

ten" (*ibid.*). Indeed, it is unrealistic to think that the distillers voluntarily would absorb markups of 17 and 20 percent, which probably constitutes a major portion of their profit on the sales.

Since the legal incidence of Mississippi's markup falls on the military purchasers, and since, as the district court correctly recognized (App. A, *infra*, p. 9a), the purchasing facilities are instrumentalities of the United States,[6] it follows that the United States has *not* consented to the imposition of a tax with respect to such purchases by facilities on the exclusively federal enclaves. The Buck Act's consent to state taxation in federal areas is limited by Section 107(a) of that Act, 4 U.S.C. 107(a), which provides that the consent "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof * * *." With respect to purchases by facilities on those bases, therefore, this Court's prior decision in the present case makes it clear that the markup is invalid. In the absence of consent to the tax, "nothing occurs within the State that gives it jurisdiction to regulate the * * * transaction" (412 U.S. at 371). There is thus no need to reach, with respect to the two federal enclaves, the constitutional tax immunity issue.

That issue must be reached, however, with respect to the two concurrent jurisdiction bases, because there the liquor is imported for delivery and use

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[6] See *Standard Oil Co.* v. *Johnson*, 316 U.S. 481; *Paul* v. *United States*, 371 U.S. 245, 261; 5 U.S.C. 2105(c).

within the jurisdiction of the State. As a tax on federal instrumentalities, the markup, in the absence of the Twenty-first Amendment, would be unconstitutional. The question is whether the Twenty-first Amendment was designed to abrogate the constitutional tax immunity doctrine so far as intoxicating liquor is concerned.

Federal tax immunity is "one of the cornerstones of our constitutional law" (*Spector Motor Service* v. *O'Connor*, 340 U.S. 602, 610)—"the unavoidable consequence of that supremacy which the constitution has declared" (*McCulloch* v. *Maryland*, 4 Wheat. 316, 436). Nothing in the language of the Twenty-first Amendment or its history suggests any purpose to alter so fundamental an incident of federalism. Cf. *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341; *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332. We submit that Mississippi's authority under the Amendment to regulate the transportation and use of alcoholic beverages within its jurisdiction does not extend so far as to permit it to impose a discriminatory tax on the federal government.[7]

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[7] The tax is discriminatory because all other retailers in the State who are required to pay a markup receive storage, wholesaling, and delivery services from the Tax Commission in exchange. Indeed, as to them, the markup may not be a tax at all. The military facilities, however, receive no services whatsoever in return for the markup. Moreover, the tax favors the State over the federal instrumentalities by requiring the latter to pay 17 or 20 percent more for the same liquor that the State purchases from the same sources without any markup. The State may not, in the exercise of its

2. The Mississippi regulation is also invalid under the Supremacy Clause of Article VI of the Constitution because it impermissibly interferes with the exclusive federal authority to regulate military procurement.[8] Article I, Section 8, of the Constitution gives Congress broad authority to "raise and support Armies," to "provide and maintain a Navy," and to regulate "the land and naval Forces." Pursuant to that authority, Congress has authorized the Secretary of Defense to regulate "the sale, consumption, possession of or traffic in" liquor on military bases (50 U.S.C. App. 473). The Secretary has accordingly promulgated regulations directing that "the purchase of all alcoholic beverages for resale at any * * * base * * * shall be in such a manner and under such conditions as shall obtain for the Government

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power to tax, treat its own instrumentalities more favorably than those of the United States. See, *e.g.*, *Moses Lake Homes, Inc.* v. *Grant County*, 365 U.S. 744, 751.

[8] This argument applies with respect to all four military bases in Mississippi. The district court declined to reach this issue with respect to the exclusive federal enclaves, because it erroneously concluded that consent to a tax under the Buck Act foreclosed an independent challenge to the tax as an unconstitutional interference with military procurement regulations (App. A, *infra*, pp. 25a-26a, n. 21). But 4 U.S.C. 105(a) provides only that "[n]o person shall be relieved from liability for payment of * * * any sales or use tax levied by any State, * * * *on the ground that the sale or use * * * occurred in whole or in part within a federal area*" (emphasis added). Its effect is only to place enclaves on an equal footing with concurrent jurisdiction bases for purposes of state sales taxes. The section does not preclude a challenge to a tax on some ground other than the one specified.

the most advantageous contract, price, and other factors considered" (32 C.F.R. 2[illegible].4(c)(1)).[9]

This policy of obtaining alcoholic beverages on the most favorable competitive terms possible is frustrated by Mississippi's regulation. The markup artificially inflates by 17 to 20 percent the price at which the military facilities could otherwise obtain their liquor. In effect, it sets a floating minimum price level which is 17 to 20 percent above the "most advantageous" price. In addition, the regulation has recently been interpreted by the Tax Commission to foreclose direct purchases of liquor from any out-of-state sources other than distillers.[10] This effort to

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[9] Inexpensive liquor is one of several economic benefits for servicemen which are designed to make enlistment attractive and to maintain high morale and efficiency in the Armed Forces (App. D, *infra*, pp. 59a-60a). The profit from sales of alcoholic beverages supports the operation of officers' and non-commissioned officers' clubs, which "provide convenient facilities for off-duty dining, entertainment, relaxation and amusement" by Armed Forces personnel and their families and which therefore "contribute to the establishment and maintenance of Service morale and esprit de corps" (*id.* at 60a).

[10] The Tax Commission, in a memorandum dated August 8, 1973, addressed to "all vendors" and sent also to the military purchasing facilities, stated that the regulation permits military facilities to purchase liquor from the State or "direct from the *distiller*" (emphasis in original) and that "[p]urchases are not to be placed with any other source" (App. E, *infra*, p. 64a). The memorandum, together with the covering letter addressed to the military bases in the State, was introduced as an exhibit in the district court on remand. It would appear to preclude continuation of the military's practice of purchasing some alcoholic beverages, particularly imported liquors, directly from out-of-state *wholesalers*.

limit the military's sources of supply collides with the policies reflected in the procurement regulation.

Where a state price regulation conflicts with federal procurement policy, the state regulation must yield pursuant to the Supremacy Clause. Thus, in *Paul* v. *United States*, 371 U.S. 245, this Court invalidated California's minimum price regulation for milk as applied to purchases by military installations pursuant to the federal procurement law and regulations. See, also, *Public Utilities Commission* v. *United States*, 355 U.S. 534; *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187; *Johnson* v. *Maryland*, 254 U.S. 51. Although the procurement regulation in *Paul* governed purchases by appropriated fund activities, whereas the regulation here governs purchases by nonappropriated fund activities, the language of the present regulation closely parallels the regulation at issue in *Paul* and reflects the same policy of requiring "active competition so that the United States may receive the most advantageous contract" (371 U.S. at 253).[11]

[11] *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U.S. 261, is not to the contrary. The Court there upheld Pennsylvania's refusal to renew the license of a milk dealer who had sold milk to a military facility at bid prices lower than the statutory minimum. The federal regulation there, unlike that here, contained an exception to the general policy of competitive procurement " 'when the price is fixed by federal, state, municipal or other competent legal authority' " (see 318 U.S. at 277). It also contained provisions manifesting a "hands off" policy with respect to state minimum price laws (*id.* at 276, 278). It was on this basis that the Court in *Paul* distinguished *Penn Dairies* (see 371 U.S. at 254-255).

Apart from the Twenty-first Amendment, therefore, the Supremacy Clause would bar Mississippi from applying its markup regulation to the alcoholic beverages purchased by the military installations. The Twenty-first Amendment does not require a contrary result. It was designed to confer on the states, by eliminating some of the potential Commerce Clause limitations, the power to regulate commerce with respect to alcoholic beverages. See *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329-331. It does not supersede "all other provisions of the United States Constitution in the area of liquor regulations" (*California* v. *LaRue*, 409 U.S. 109, 115). Nothing in its language or history suggests that it was intended to diminish congressional authority to regulate military affairs.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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NOVEMBER 1974.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI
JACKSON DIVISION

[Filed Jun. 12, 1974, Southern District of Mississippi, Robert C. Thomas, Clerk]

Civil Action No. 4554

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL., DEFENDANTS

OPINION

Before CLARK, Circuit Judge; RUSSELL, Chief District Judge; and COX, District Judge.

CLARK, Circuit Judge:

> We are called upon to solve another of the recurring conflicts between the power to tax and the right to be free from taxation which are inevitable where two governments function at the same time and in the same territory.
>
> In arguing the case of McCulloch v. Maryland, Luther Martin, Attorney General of Maryland, himself a member of the Constitutional Convention, said, "The whole of this subject of taxation is full of difficulties, which the Convention found it impossible to solve, in a manner entirely satisfactory. . . . This was one of the

> anomalies of the government, the evils of which must be endured, or mitigated by discretion and mutual forbearance." McCulloch v. Maryland, 4 Wheat. 316, 376, 4 L.Ed. 579. Where discretion and forbearance have failed it often has fallen to this Court to determine specific cases for which the Convention was unable to agree upon a general rule. Looking backward it is easy to see that the line between the taxable and the immune has been drawn by an unsteady hand.

United States v. Allegheny County, 322 U.S. 174, 175-76, 64 S.Ct. 908, 910, —— L.Ed. —— (1944).

In the case at bar, the State of Mississippi and the federal government are brought into conflict through exercises of their respective sovereign power, which each claims is paramount to the other under the Constitution. More precisely, our task today is to determine whether the State's exaction of a tax on wholesale sales by independent vendors of liquor to federal military organizations violates the immunity of the United States from state taxation or impermissibly interferes with federal military procurement policy and regulations.

Under the XXI Amendment, the State of Mississippi controls the importation and sale of intoxicating liquor through an integrated statutory scheme under which the State Tax Commission is designated as the sole importer and wholesaler of alcoholic beverages, which may be distributed only to licensed retailers within the state, "including . . . any retail distributors operating within any military post . . .

within the boundaries of the State . . . ." [1] The statutory plan directs the Commission to "add to the cost of all alcoholic beverages [which it distributes to retailers] such . . . markups as in its discretion will be adequate to cover the cost of operation of the State wholesale liquor business, yield a reasonable profit, and be competitive with liquor prices in neighboring states." [2] Pursuant to its delegated authority, the Commission promulgated Regulation 25,[3] which gives military clubs an option to purchase liquor either from the Commission or directly from the distiller. Of the four military organizations involved,

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[1] Miss. Code Ann. § 67-1-41 (1972).

[2] Miss. Code Ann. § 27-71-11 (1972).

[3] SALES TO MILITARY POST EXCHANGES, ETC.

Post exchanges, ship stores, and officers' clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller or from the Alcoholic Beverage Control Division of the State Tax Commission. In the event an order is placed by such organization directly with a distiller, a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.

All orders of such organizations shall bear the usual wholesale markup in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller, which shall in turn remit the wholesale markup to the Alcoholic Beverage Control Division of the State Tax Commission monthly covering shipments made for the previous month.

two are located on Keesler Air Force Base and the Naval Construction Battalion Center in Harrison County, Mississippi. The United States possesses exclusive jurisdiction over these bases. The remaining two are operated on Columbus Air Force Base and Meridian Naval Air Station in Lauderdale County, Mississippi. The United States and the State of Mississippi exercise concurrent jurisdiction on these bases. All of the clubs have opted to procure their liquor provisions directly from out-of-state distillers and suppliers. Under Regulation 25 these distillers and suppliers must remit the wholesale markup of 17% on distilled spirits and 20% on wine to the Commission or face severe sanctions.[4] After a considerable period of operations under the regulation, the United States instituted this litigation seeking declaratory and injunctive relief prohibiting application and enforcement of the regulation against purchases by the armed services clubs and a money judgment returning all revenues transmitted by these purchasers through their suppliers to the Commission. The complaint alleged that the State, through enforcement of Regulation 25, had unconstitutionally encroached upon the sovereignty of the United States by (1) legislating as to territory over which the federal government enjoys exclusive jurisdiction, (2)

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[4] Any supplier who fails to comply with the regulation is subject to delistment—withdrawal of the privilege of distributing alcoholic beverages to the Commission for resale in Mississippi—and to criminal prosecution. *See* Miss. Code Ann. §§ 67-1-45, 27-71-347 (1972).

exacting a tax from federal instrumentalities, and (3) obstructing federal military procurement regulations and policy.

On the basis of the State's express XXI Amendment regulatory dominion over packaged liquor transactions, this court sustained the regulation in the face of the government's constitutional attacks, found it unnecessary to reach the remaining questions and rendered judgment in favor of the defendant Commission. United States v. State Tax Commission, 340 F.Supp. 903 (S.D. Miss. 1972). On direct appeal the United States Supreme Court reversed, holding that we erred "in concluding that the Twenty-first Amendment provides the State with sufficient authority over liquor transactions to support the application of the Regulation to the two bases over which the United States exercises exclusive jurisdiction . . . ." —— U.S. ——, ——, 93 S.Ct. 2183, 2187, —— L.Ed.2d —— (1973). The Court's mandate vacated the judgment for the Commission and remanded the cause to us for determination of the issues we declined to reach in our prior decision.[5]

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[5] Although it is arguable that this declaratory and injunctive action would not fall within the ambit of 28 U.S.C. § 2281 if the sole basis of relief advanced by the government was premised on the repugnance of Regulation 25 to federal procurement policy and regulations, *see, e.g.*, Swift & Co. v. Wickham, 382 U.S. 111, 86 S.Ct. 258, —— L.Ed.2d —— (1965); *see also* Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290, 43 S.Ct. 353, 67 L.Ed. 659 (1923), the substantial constitutional question raised by the government's assertion

I. *Exclusive Federal Enclaves*

While acknowledging that it cannot assert its XXI Amendment police powers as to the transportation or importation of intoxicating liquors into exclusively federal enclaves, the Tax Commission nevertheless contends that Congress has, by virtue of the Buck Act, 4 U.S.C.A. §§ 104-10 (Supp. 1974), authorized and consented to the application of Mississippi's markup to wholesale liquor transactions between nonresident distillers and suppliers and the federal operatives on such military bases. Section 105(a) of the Act provides:

> No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal Area . . . ."

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of State tax immunity renders this cause appropriate for disposition by three judges and satisfies the jurisdictional prerequisites of the statute. *See, e.g.*, Department of Employment v. United States, 385 U.S. 355, 87 S.Ct. 464, —— L.Ed.2d —— (1966); United States v. Georgia Public Service Commission, 371 U.S. 285, 83 S.Ct. 397, —— L.Ed.2d —— (1963); Paul v. United States, 371 U.S. 245, 83 S.Ct. 426, —— L.Ed.2d —— (1963); Query v. United States, 316 U.S. 486, 62 S.Ct. 1122, —— L.Ed. —— (1942); United States v. Livingston, 179 F.Supp. 9 (E.D.S.C. 1959), *aff'd*, 364 U.S. 281, 80 S.Ct. 1611, 4 L.Ed.2d 1719 (1960); *see also* Sands v. Wainwright, —— F.2d —— (5th Cir. 1973) [No. 73-1192, Dec. 26, 1973].

Act of July 30, 1947, § 1, 61 Stat. 644, 4 U.S.C. § 105(a).[6] Another provision of the statute, section 107(a), limits section 105(a) by providing that it "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof . . . ." 4 U.S.C.A. § 107(a) (Supp. 1974). The Supreme Court certified two Buck Act issues for determination by this court on remand: "Whether the markup should be treated as a tax on sales occurring within a federal area within the meaning of § 105(a), . . . and, if so, whether the exception contained in § 107(a) nevertheless serves to remove the markup from the consent provision for purposes of the two exclusively federal enclaves . . . ." —— U.S. at ——, 93 S.Ct. at 2193. Because we conclude that the first of these questions should be resolved in the affirmative and the second in the negative, we hold that Congress has legislatively acceded to Mississippi's markup on such wholesale liquor transactions.

At the election of the military, every sale at issue here is consummated directly between the military

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[6] This statute was enacted in response to the decision in James v. Dravo Contracting Co., 302 U.S. 134, 58 S.Ct. 208, ——L.Ed. —— (1938), in which the Supreme Court held that the states had no constitutional power to tax the income or receipts from transactions occurring on or services performed in an area over which the United States possesses exclusive jurisdiction. S.Rep. No. 1625, 76th Cong., 3rd Sess. (1940). A state has jurisdiction to impose a tax only on those activities that are carried on within its territorial limits. James v. Dravo Contracting Co., *supra*, 302 U.S. at 138, 53 S.Ct. at 211.

organizations and the out-of-state liquor vendors without recourse to the State's wholesaling, warehousing or delivery service. The post exchanges, ship's stores, and officers' clubs chose the alternative course afforded by Regulation 25 of placing their orders directly with the wholesalers, who are required to mail immediately a copy of the order to the Commission.[7] The base price to the military vendees is determined solely by the vendor. All that Mississippi requires is that the vendor add the prescribed "wholesale markup" of 17% on whiskies or 20% on wines to the base price, and, after payment remit the amount of such markup to the Commission.

Neither party construes the markup as anything other than a tax. Although it serves to defray the cost to the State of its warehousing service and to regulate the traffic in intoxicating beverages, the markup is levied and recovered by compulsion of law in an amount that will, in the Commission's discretion, "yield a reasonable profit and be competitive with liquor prices in neighboring states." Such profits are paid into Mississippi's general revenue fund.[8] In this factual setting we do not hesitate to denominate the wholesale markup as a tax—"an exaction for the support of the government." United States v. Butler, 297 U.S. 1, 61, 56 S.Ct. 312, 317, —— L.Ed. —— (1936).

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[7] *See* note 3, *supra*; Miss. Code Ann. § 67-1-73 (1972).

[8] Miss. Code Ann. § 27-71-29 (1972).

Similarly, the markup constitutes a "sales or use tax" within the ambit of section 105(a). Although it may more precisely be characterized as an excise or privilege tax on those who wish to distribute distilled spirits within Mississippi, the markup, however labeled, clearly conforms to the Buck Act's definition of a sales or use tax, namely "any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property." 4 U.S.C.A. § 110(b) (Supp. 1974).

With these preliminary issues resolved, we must determine whether Mississippi has attempted to levy or collect a "tax on or from the United States or any instrumentality thereof" as condemned by section 107 (a). At the outset of this inquiry, it is clear that the ship's stores, officers' clubs and post exchanges "as now operated are arms of the government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunities it may have under the Constitution and federal statutes." Standard Oil Co. v. Johnson, 316 U.S. 481, 485, 62 S.Ct. 1168, 1170 (1942); *see also* 5 U.S.C. § 2105(c).[9]

The government maintains that section 107(a) represents an express congressional reaffirmation of the

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[9] For a discussion of the various hallmarks of federal instrumentalities see First Agricultural National Bank v. State Tax Commission, 392 U.S. 339, 352-54, 88 S.Ct. 2173, 2180-81, —— L.Ed.2d —— (1968) (Marshall, J., dissenting).

venerable principle of federal immunity from state taxation promulgated by McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579 (1819). That doctrine, it contends, constitutionally proscribes Mississippi's markup on wholesale liquor sales to these military vendees.[10] Although it has never been doubted that Congress is constitutionally vested with the authority to insulate federal instrumentalities, vendors and contractors from state taxation by extending the mantle of federal tax immunity beyond the bounds which the Supreme Court has determined the Constitution impliedly warrants,[11] neither the legislative history nor any judicial decision attributes to the Buck Act any congressional intention to exercise that legislative prerogative. We hold that section 107(a) goes

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[10] The government contends also that the Buck Act cannot assent to state taxation of sales to military clubs on exclusive federal bases since those transactions, which are completed directly with out-of-state wholesalers, do not occur on the bases or in any area within the jurisdiction of the State of Mississippi. However, the very language of the Buck Act answers the argument. "[T]he sale . . . with respect to which such tax is levied," is within the Act's purview if it "occurred in whole or in part within a Federal area." 4 U.S.C. § 105(a). Certainly a crucial part of these sales—delivery for intended use—occurred on these bases.

[11] *See, e.g.*, First Agricultural National Bank v. State Tax Commission, *supra*, 392 U.S. at 352, 362, 88 S.Ct. at 2180, 2185 (Marshall, J., dissenting); United States v. City of Detroit, 355 U.S. 466, 474, 78 S.Ct. 474, 478, 2 L.Ed.2d 424 (1958); United States v. Allegheny County, *supra*, 322 U.S. at 196, 64 S.Ct. at 920 (Frankfurter, J., dissenting); James v. Dravo Contracting Company, *supra*, 302 U.S. at 161, 58 S.Ct. at 221.

no further than to restate the constitutional limit.[12] Hence, we must reconcile Mississippi's wholesale liquor markup as applied *sub judice*, with that relatively obscure doctrine.

> For one hundred and twenty years this Court has been concerned with claims of immunity from taxes imposed by one authority in our dual system of government because of the taxpayer's relation to the other. The basis for the Court's intervention in this field has not been any explicit provision of the Constitution. The States, after they formed the Union, continued to have the same range of taxing power which

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[12] It is possible to construe the pertinent language of Section 107(a), which states that "[t]he provisions of Sections 105 and 106 . . . shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof . . . .," in either of two ways. The first interpretation would say that this portion of the Buck Act merely reaffirms the traditional immunity doctrine. The second view would read it as broadly declaring the federal government and its instrumentalities free from the burden of all State vendor and vendee sales or use taxes. However, in the absence of any contemporaneous congressional comment indicating that a total tax immunity for federal instrumentalities was intended, *see* S.Rep. No. 1625, 76th Cong., 3rd Sess. (1940), we opt for the first view. If an all-pervasive exemption was desired, more ample language than that which merely outlines the constitutional minimum as prescribed by *McCulloch* surely would have been chosen. The question of which construction is proper is not free of difficulty. *See* Powell, The Waning of Intergovernmental Tax Immunities, 58 Harv.L. Rev. 633 (1945). Any state tax that abridges the federal government's immunity must, therefore, lie outside the consensual provisions of Section 105(a) by force of the exceptive language of Section 107(a), and vice versa.

> they had before, barring only duties affecting exports, imports, and on tonnage. Congress, on the other hand, to lay taxes in order "to pay the Debts and provide for the common Defence and general Welfare of the United States", Art. 1, Sec. 8, U.S.C.A. Const., can reach every person and every dollar in the land with due regard to Constitutional limitations as to the method of laying taxes. But, as is true of other great activities of the state and national governments, the fact that we are a federalism raises problems regarding these vital powers of taxation. Since two governments have authority within the same territory, neither through its powers to tax can be allowed to cripple the operations of the other. Therefore state and federal governments must avoid exactions which discriminate against each other or obviously interfere with one another's operations. These were the determining considerations that led the great Chief Justice to strike down the Maryland statute [in McCulloch v. Maryland, *supra*] as an unambiguous measure of discrimination against the use by the United States of the Bank of the United States as one of its instruments of government.

Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 488, 59 S.Ct. 595, 602, 83 L.Ed. 927 (1939) (Frankfurter, J., concurring) (footnote omitted).[13] For over

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[13] The doctrine was born of the necessity of protection of the functions of each sovereignty, operating in the same territory, from a frustrating taxing power of the other. Since the principle requires immunity from the economic burden of the other's taxes, it is not surprising that in an earlier year when governments were small and taxes

a century federal immunity was increscent. With consistency, courts disallowed state taxes on persons dealing with the government [14] until the seminal de-

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and economics less complex, a concentration upon the economic burden should have led to an extension of the doctrine to persons dealing with the governments. Taxation of salaries of government employees and of the activities of vendors to government of goods and services created an econmic burden readily perceived, if imperfectly measured. Carried to its extreme in modern society, however, the logical extension of the doctrine would be ridiculous. Economists may estimate the total tax increment in the cost of a complicated machine or of construction of a building, but an attempt to relieve a purchasing sovereign of the economic burden of all taxes, however remote and indirectly imposed, would not only be impossible of accomplishment, but would seriously disrupt the functions of each of the dual sovereignties. Confinement of the extension was difficult, for distinctions between imposts more or less remote and indirect frequently lacked substance. Furthermore, it was not easy to see why the obligations of a manufacturer to the state and community, whose protection and services he enjoyed, should vary with the fluctuations in the ratio of his sales to the United States to his total sales.

United States v. Livingston, *supra*, 179 F.Supp. at 19-20 (Haynesworth, J.).

[14] In Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U.S. 218, 48 S.Ct. 451, —— L.Ed. —— (1928), the court invalidated Mississippi's privilege tax on retail gasoline dealers, which was measured by the amount of gasoline sold, as applied to retail sales to the Coast Guard and a Veteran's Hospital, both federal instrumentalities. The Court likewise overturned an Alabama excise tax on gasoline distributors as ratably imposed on their sales to the federal government in Graves v. Texas Co., 298 U.S. 393, 56 S.Ct. 818, —— L.Ed. —— (1936).

Both *Panhandle Oil* and *Graves* were overruled to the extent they were inconsistent with the reasoning and result in Ala-

cisions in James v. Dravo Contracting Co., *supra*, and Alabama v. King & Boozer, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3 (1941), heralded a modern reappraisal of the doctrine.

> After having long been the subject of differences of opinion, the extent of this implied immunity was greatly curtailed. The basis of the doctrine was shifted from that of an argumentative financial burden to the Federal Government to that of freedom from discrimination against transactions with the Government and freedom from direct impositions upon the property and the instrumentalities of the Government. The decisions in James v. Dravo Contracting Co. [*supra*], and State of Alabama v. King & Boozer [*supra*], mean nothing unless they mean that it is not enough that the Government may ultimately have to bear the cost of a part or even the whole of a tax which a State imposes on a third person who has business relations with the Government, when a State could impose such a tax upon such a third person but for the fact that the transaction which gave rise to it was not with a private person but with the Government.

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bama v. King & Boozer, *infra*. What is left of their value as precedent is a matter of speculation only. We note also that the Court was faced with and unable to reach precisely the same question posed *sub judice* by enforcement of the markup as to military exchanges on exclusively federal enclaves in Query v. United States, *supra*, and Standard Oil Co. v. Johnson, *supra*.

United States v. Allegheny County, *supra*, 322 U.S. at 195-96, 64 S.Ct. at 919-20 (Frankfurter, J., dissenting) (citations omitted).

In *James* the Court sustained West Virginia's tax on the gross receipts of a government contractor, holding that the "valid exaction" was not a direct burden nor laid upon the federal government, its property, or its instrumentality and did "not interfere in any substantial way with the performance of federal functions . . . ." 302 U.S. at 161, 58 S.Ct. at 221. The *King & Boozer* Court upheld application of Alabama's sales tax to the purchase of lumber by a federal contractor for use in completing construction of an army camp under a cost-plus-fixed fee contract.[15] These cases buried the notion that a state exaction offended the Constitution merely because the United States or its operatives ultimately bore the economic burden imposed by the tax.

> The Government, rightly we think, disclaims any contention that the Constitution, unaided by Congressional legislation, prohibits a tax exacted from the contractors merely because it is passed on economically, by the terms of the con-

[15] In Silas Mason Co. v. Tax Commission, 302 U.S. 186, 58 S.Ct. 233, 82 L.Ed. 187 (1937), the Court approved an occupation tax levied by the State of Washington upon the gross receipts of a federal contractor who had been engaged in constructing the Grand Coulee Dam. The decision in Curry v. United States, 314 U.S. 14, 62 S.Ct. 48, 86 L.Ed. 9 (1941), sustained enforcement of Alabama's use tax (against the same contractor involved in *King & Boozer*) as to material's purchased from an out-of-state vendor for performance of the federal contract.

> tract or otherwise, as a part of the construction cost to the Government. So far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territoy of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see Panhandle Oil Co. v. State ex rel. Knox, supra; Graves v. Texas Co., supra, we think it no longer tenable.

Alabama v. King & Boozer, *supra*, 314 U.S. at 8-9, 62 S.Ct. at 45.[16] *King & Boozer*, although incidental-

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[16] Chief Justice Hughes wrote for the *James* Court as follows:

> There is no ineluctable logic which makes the doctrine of immunity with respect to government bonds applicable to the earnings of an independent contractor rendering services to the Government. That doctrine recognizes the direct effect of a tax which 'would operate on the power to borrow before it is exercised' . . . and which would directly affect the Government's obligation as a continuing security. Vital considerations are there involved respecting the permanent relations of the Government to investors in its securities and its ability to maintain its credit,—considerations which are not found in connection with contracts made from time to time for the services of independent contractors. And in dealing with the question of a taxability of such contractors upon the fruits of their work, we are not bound to consider or decide how far immunity from taxation is to be deemed essential to the protection of Government in relation to

ly different on its facts from the instant case, established the principle, which has been subsequently refined and reaffirmed,[17] that the Constitution only forbids a state tax whose legal, as opposed to purely economic, incidence falls upon the federal government, its property or its instruments, either by virtue of the terms of the federal contract[18] or the plain words of the state's taxing legislation as sensibly construed. The touchstone for our inquiry, therefore, is the point of legal incidence of Mississippi's wholesale markup on alcoholic beverages.

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its purchases of commodities or whether the doctrine announced in the cases of that character which we have cited deserves revision or restriction.

James v. Dravo Contracting Co., *supra*, 302 U.S. at 152-53, 58 S.Ct. at 217-18. The dissent of Mr. Justice Roberts details the pre-*James* concept of federal tax immunity. *See* 302 U.S. at 161, 58 S.Ct. at 221.

[17] *See, e.g.*, United States v. Boyd, 378 U.S. 39, 84 S.Ct. 1518, —— L.Ed.2d —— (1964); Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 382 *n.* 12, 84 S.Ct. 378, 388 *n.* 12, —— L.Ed.2d —— (1964); United States v. City of Detroit, *supra*; United States v. Township of Muskegon, 355 U.S. 484, 78 S.Ct. 483, —— L.Ed.2d —— (1958); Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 74 S.Ct. 403, —— L.Ed. —— (1954).

[18] In Kern-Limerick, Inc. v. Scurlock, *supra*, the Court distinguished *King & Boozer* and held that the federal cost-plus-fixed fee contract, which provided that the United States would assume title to and liability for materials purchased in performance thereof by the federal contractor, who had been delegated authority to act as the government's purchasing agent, operated to shift the legal incidence of a state sales tax from the contractor-purchaser to the federal government, thereby rendering it unconstitutional.

The abstraction "legal incidence" is a term that has never been explicitly formulated by the Supreme Court. We construe it to mean the legally enforceable, unavoidable liability for nonpayment of the tax. The legal incidence of a tax falls upon that entity or person to whom the state under a reasonable interpretation of its entire taxing scheme ultimately looks for satisfaction of the exaction. *Cf.* Colorado National Bank v. Bedford, 310 U.S. 41, 52, 60 S.Ct. 800, 805, —— L.Ed. —— (1940). The government argues that the "legal incidence" of a tax, which it contends connotes more than the direct obligation to pay, falls upon "a person who is unable to shift it onto someone else and who thereafter bears the money burden of the tax." It points here to the fact that it in the end must bear the cost of the markup since the supplier is required by the regulation both to collect it from the military purchaser and pay it over to the State. This proposition was laid to rest in *King & Boozer.* We conclude that under Regulation 25 as written and enforced the legal incidence of the markup attaches to the wholesaler despite the fact that he is required "in turn to remit" the wholesale tax to the Commission out of the proceeds of sale.

"[W]e are not bound by the state court's characterization of the tax," First Agricultural National Bank v. State Tax Commission, *supra*, 392 U.S. at 347, 88 S.Ct. at 2177, which is ordinarily of great weight if it is consistent with a reasonable construction of the taxing scheme, American Oil Co. v. Neill, 380 U.S. 451, 85 S.Ct. 1130, —— L.Ed.2d ——

(1965); Colorado National Bank v. Bedford, *supra*, because "the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." Kern-Limerick, Inc. v. Scurlock, *supra*, 347 U.S. at 121, 74 S.Ct. at 410; *see, e.g.*, United States v. Allegheny County, *supra*, 322 U.S. at 134, 64 S.Ct. at 914; Carpenter v. Shaw, 280 U.S. 363, 367-68, 50 S.Ct. 121, 123, —— L.Ed. —— (1930).

Although the parties have not cited and we have not found any Mississippi decision that judicially interprets either Regulation 25 or the applicable provisions of the alcoholic beverage control statute, our guideposts are plain.

> When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather than form. . . . This approach requires us to determine the ultimate effect of the law as applied and enforced by a State or, in other words, to find the operating incidence of the tax.

American Oil Co. v. Neill, *supra*, 380 U.S. at 455, 85 S.Ct. at 1133 (citations omitted).

> [T]he implied immunity of one government and its agencies from taxation by the other should as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at

> the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed.

Graves v. New York ex rel. O'Keefe, *supra*, 306 U.S. at 483, 59 S.Ct. at 600.

Some time after Regulation 25 was adopted, wholesalers and military organizations began a practice of depositing the amount of the markup on each sale into an escrow account rather than remitting it to the State Tax Commission. When this practice was discovered the Director of the Alcoholic Beverage Control Division wrote a letter to all wholesalers which mandated strict compliance with the regulation, as it was interpreted in the director's letter, on pain of criminal penalties and delistment for all future sales in the State. The letter required the wholesaler to prepay the markup to the Commission at the time of shipment to the military customer and thereafter to invoice and collect the fee from the ship's store, officers' club or post exchange. We deem it significant that the letter's commands were directed to the numerous wholesalers involved, rather than to the four military establishments. Of equal cogency is the director's requirement that the wholesaler pay the tax *in advance* of its collection from his customer.

Since they chose not to deal with the Commission, the military-vendees' only financial responsibility is to the wholesaler for the debt incurred for the intoxicating liquors obtained. The vendor may fix the price at which he sells altogether free of any state control or restraint. Thus, it is he who controls where the

burden of the markup eventually falls. By adjusting his selling price he may absorb the markup entirely or pass some or all of it along to the military purchaser. In view of the decision to buy direct, the only effect on these military sales which necessarily results from Mississippi's law or regulation is the grant of an exemption from all "state taxes" under Regulation 25.

Only the wholesalers and suppliers have been or will be subject to criminal prosecution or economic sanction at the hands of the State. Mississippi's ABC Act and regulations do not impose any sanctions on the vendor if he absorbs all or any portion of the markup's economic burden, nor do they return a percentage of the revenues to the wholesaler as a commission for collecting the tax. *See* First Agricultural National Bank v. State Tax Commission, *supra;* United States v. Nevada Tax Commission, 291 F.Supp. 530 (D. Nev. 1968), *aff'd*, 439 F.2d 435 (9th Cir. 1969). The purchaser-vendee is not legally or otherwise obligated to the Commission or the State for payment of the markup. *See* Alabama v. King & Boozer, *supra.*

Since the tax must be prepaid by the seller, it can never become a debt to the supplier separate from the total sales price, nor is it recoverable at law from the purchaser. Neither the statute nor the regulation contain a prohibition against advising or even advertising that the markup will be absorbed or refunded. *See* Federal Land Bank v. Bismarck, 314 U.S. 95, 62 S.Ct. 1, 86 L.Ed. 65 (1941). Ultimately

the markup is paid from the assets or gross receipts of the wholesaler, *see* Colorado National Bank v. Bedford, *supra*, whose liability to the State cannot be defeated by his failure, inability, or refusal to collect the tax or by the impracticability of doing so. *See* United States v. Livingston, *supra*, 179 F.Supp. at 30 (Timmerman, D.J., dissenting). Any actual shift of the tax to the military which the wholesaler may be able to effect would be wholly negotiated rather than mandated by State law.[19]

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[19] In contrast, Mississippi's *sales* tax must be added to the sale price and collected by the vendor from the vendee at the time of purchase. Miss. Code Ann. § 27-65-31 (1972). This sales tax not only constitutes a legal obligation from the vendor to the state, Miss. Code Ann. § 27-65-41 (1972), but creates a debtor-creditor relationship between the vendor and his vendee, who is legally liable to his vendor for the full amount of the tax, even if the seller has unlawfully failed to collect it from him. *See* Woodrich v. Catherine Gravel Co., 188 Miss. 417, 195 So. 307 (1940). We note also that the Navy Exchange Manual provides as follows:

> 2634 SALES AND USE TAXES
>
> The courts have made a distinction between the "legal incidence" of a tax and its "economic burden." Thus, the courts have come to hold that a state may not impose a tax, the "legal incidence" of which falls directly upon the Federal Government or any of its instrumentalities. That means that a state may neither require an Exchange to pay a tax which is imposed directly upon it, nor require it to collect a tax imposed upon its authorized patrons. A state may, however, validly impose a tax which affects the Exchange only indirectly by increasing the cost of the supplies that it purchases.
>
> In such a case, the economic burden would eventually fall upon the Exchange, but the legal incidence would be elsewhere. Therefore, when a state imposes a tax directly

The government's argument that the reasoning in First Agricultural National Bank v. State Tax Commission, *supra*, compels the conclusion in this case that the legal incidence of the markup falls upon the military purchasers is misplaced. There the Court held that the legal incidence of a state sales tax, which "by its terms must be passed on to the purchaser," was imposed not on the vendor, who was prohibited from advertising that he would assume or absorb the tax, but on the vendee national bank. Mr. Justice Black, writing for the majority, stated:

> We cannot accept the reasoning of the court below that simply because there is no sanction against a vendor who refuses to pass on the tax (assuming this is true), this means the tax is on the vendor. There can be no doubt from the

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upon a supplier to the Exchange and it is his obligation to collect and pay it, the tax is valid, even though the Exchange would eventually bear the burden of the tax, economically, by paying higher prices.

2615 TAXES IMPOSED ON SUPPLIERS AND CONTRACTORS

Federal and state taxes may be imposed on contractors and suppliers who have dealings with Exchanges. When the legal incidence of the tax is not on the Exchange, the constitutional immunity of the Exchange as a U. S. Government instrumentality does not apply. The Exchange, in the case of a tax on contractors or suppliers, would eventually bear the economic burden of the Tax in the form of increased cost of the supplies purchased, unless an exemption were provided by the taxing authority. However, this economic burden does not invalidate the tax.

> clear wording of the statute that the Massachusetts Legislature intended that this sales tax be passed on to the purchaser. For our purposes, at least, that intent is controlling.

First Agricultural National Bank v. State Tax Commission, *supra*, 392 U.S. at 348, 88 S.Ct. at 2178. The instant wholesale liquor markup on military sales is not afflicted with either of the statutory infirmities that Mr. Justice Black found compelling. When considered within the factual matrix of this record, it is abundantly clear that the legal incidence of the markup was intended to be levied upon and borne by the controlled wholesaler rather than the military purchaser.[20]

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[20] *See* K. Wolf, State Taxation of Government Contractors 221-29 (1964); Powell, The Remnant of Intergovernmental Tax Immunities, 58 Harv.L.Rev. 757, 763 (1945). *Compare* American Oil Co. v. Neill, *supra* (legal incidence of privilege tax on gasoline dealer-vendor); Polar Ice Cream & Creamery Co. v. Andrews, *supra* (legal incidence of privilege tax on milk processor-distributor); Esso Standard Oil v. Evans, 345 U.S. 495, 73 S.Ct. 800, 97 L.Ed. 1174 (1953) (legal incidence of gasoline storage tax on distributor); Howard v. Commissioners of Sinking Fund, 344 U.S. 624, 73 S.Ct. 465, —— L.Ed. —— (1953) (legal incidence of city income-privilege tax on earnings of government employees); Norton Co. v. Dept. of Revenue, 340 U.S. 534, 71 S.Ct. 377, —— L.Ed. —— (1951) (legal incidence of privilege-sales tax on vendor); Silas Mason Co. v. Tax Commission, *supra* (legal incidence of privilege tax on federal contractor); United States v. Dept. of Revenue, 202 F.Supp. 757 (N.D. Ill. 1962), *aff'd*, 371 U.S. 21, 83 S.Ct. 117, 9 L.Ed. 95 (1963) (legal incidence of privilege-sales and use taxes on retailer); United States v. Sharp, 302 F.Supp. 668 (S.D. Miss. 1969) (legal incidence of privilege-sales tax on gasoline distributor) *with* Sullivan v. United States, 395 U.S. 169, 89 S.Ct. 1648, —— L.Ed.2d —— (1969)

On these facts, therefore, we conclude that the markup, which is a tax on sales occurring within a federal area within the scope of section 105(a), lies outside the section 107(a) exception to the Act's consent provision since Mississippi has not attempted to levy or collect any tax on or from the United States or any instrumentality thereof. Because the wholesale markup lies within the consensual ambit of the Buck Act, we hold that Congress has waived any federal challenge to the authority in the State of Mississippi over these transactions and has assented to the state's enforcement of Regulation 25 on Kessler Air Force Base and the Naval Construction Battalion Center over which the United States exercises otherwise exclusive jurisdiction. *See* Polar Ice Cream & Creamery Co. v. Andrews, *supra*, 375 U.S. at 383, 84 S.Ct. at 391; *cf.* Howard v. Commissioners of Sinking Fund, supra.[21]

(legal incidence of sales and use taxes on purchaser); First Agricultural National Bank v. State Tax Commission, *supra* (legal incidence of sales and use taxes on vendee national banks); Kern-Limerick, Inc. v. Scurlock, *supra* (legal incidence of sales tax on purchaser); Curry v. United States, *supra* (legal incidence of use tax on purchaser); Alabama v. King & Boozer, *supra* (legal incidence of sales tax on purchaser); Federal Land Bank v. Bismarck, *supra* (legal incidence of sales tax on purchaser); Colorado National Bank v. Bedford, *supra* (legal incidence of service tax on user); United States v. Livingston, *supra* (legal incidence of sales and use taxes on purchaser); United States v. Nevada Tax Commission, *supra* (legal incidence of sales and use taxes on purchaser).

[21] Because we hold that the United States has assented statutorily to application of the markup to purchases of liquor

II. *Concurrent State and Federal Enclaves*

We now turn our attention to the somewhat different problems that arise from enforcement of the markup on Columbus Air Force Base and Meridian Naval Air Station, over which Mississippi and the United States enjoy concurrent sovereignty. Because the State's XXI Amendment power to regulate distilled spirits by definition extends to joint state and federal enclaves, the Supreme Court concluded that, on this remand, the government would be unable "to rest its claim for immunity from the markup with respect to purchases of liquor for the nonappropriated fund activities of these bases on Art. I, § 8, cl. 17." —— U.S. at ——, 93 S.Ct. at 2193. This portion of the Constitution empowers Congress to "exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings."

The government restates its contention that, when applied to purchases by military clubs on concurrent state and federal areas, the markup infringes the constitutional immunity of federal instrumentalities

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by the military clubs on the exclusively federal bases, we need not reach the government's contention that the regulatory and taxing scheme impermissibly interferes with federal liquor procurement policy and regulations, a question which we resolve against the government's position in part II, *infra*, as to purchases by the military on concurrent state and federal areas.

from state taxation. In addition, it contends that enforcement of the Commission's regulatory and taxing scheme on these military purchases of alcoholic beverages is constitutionally repugnant to the Supremacy Clause because this exercise of state power conflicts with federal military procurement regulations and policy. Our prior holding, however, that the wholesale markup does not abridge the military's constitutional and Buck Act immunity from state taxation on exclusive jurisdiction bases applies with equal force against, and hence forecloses the government's assertion of similar immunity with respect to wholesale purchases by military affiliated organizations on joint state and federal areas as well.

The Tax Commission contends that the consensual language of the Buck Act, 4 U.S.C. § 105(a), which we hold permits Mississippi to enforce the markup on exclusively federal military enclaves, is also applicable to and allows its enforcement against liquor purchases by the military on the joint state and federal bases. Section 105(a) waives immunity from state taxation "on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area." Section 110(e) of the Act, which defines a federal area as "any lands or premises held or acquired by or for the use of the United States . . .

which [are] located within the exterior boundaries of any State . . . ," does not settle the point. The legislative history, however, demonstrates that the Act was designed to overrule that portion of the decision in James v. Dravo Contracting Co., *supra*, which exempted from state taxation the income or receipts from transactions occurring or services performed within exclusively federal enclaves. At the same time the *James* Court sustained the state's power to tax income or receipts which were derived from activities that occurred on areas subject to concurrent state and federal jurisdiction. The legislative history, therefore, supports the inference that the Buck Act was not intended to apply to concurrent state and federal enclaves, to which the state's taxing jurisdiction already extends by conveyance or consent. *See* James v. Dravo Contracting Co., *supra*. The Buck Act only operates to restore parity to an existing State right to tax. It does not create any new taxing power on the concurrent jurisdiction bases. Indeed, it contains an express disclaimer of any waiver of the federal government's constitutional immunity from State taxation. 4 U.S.C. § 107(a).

Our concluding task is to harmonize the State's XXI Amendment prerogative and the power of the federal government to execute its military procurement policy on concurrent jurisdiction bases. Art. I, § 8, invests Congress with authority "[t]o make all laws which shall be necessary and proper for carrying into Execution" its delegated power "[t]o provide for organizing, arming, and disciplining, the

Militia, and for governing such Part of them as may be employed in the Service of the United States . . . ." Art. IV, § 3, cl. 2, grants it "power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." Pursuant thereto, Congress enacted 50 U.S.C. App. § 473, which provides:

> The Secretary of Defense is authorized to make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces or the National Security Training Corps at or near any camp, station, post, or other place primarily occupied by members of the Armed Forces or the National Security Training Corps.

Acting in accordance with his delegated authority, the Secretary of Defense promulgated Department of Defense Directive 1330.15, 32 C.F.R. § 261 (1973), which sets forth in pertinent part department policy governing the purchase and sale of alcoholic beverages by all components of the armed services through on-base outlets:

> 1. [The Department of Defense] will cooperate with all duly constituted regulatory officials (local, state and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this Directive. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within the United States shall be in such

> a manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered, *without regard to prices locally established by state statute or otherwise.*
>
> 2. This policy of cooperation is not to be construed or represented as an admission of any legal obligation to submit to state control.

32 C.F.R. § 261.4(c) (1966) (emphasis added). On June 9, 1966, the directive was amended by deleting the italicized words in ¶ 1.

Pointing to the decisions in Paul v. United States, *supra*, and Mayo v. United States, 319 U.S. 441, 63 S.Ct. 1137, —— L.Ed. —— (1943), the United States contends that enforcement of Regulation 25 by the State disrupts the federal policy of competitive procurement of alcoholic beverages under the most favorable terms to the military operatives, as reflected in the Secretary's directive, and improperly imposes significant operating conditions on the activities of federal instrumentalities.

In an important antecedent to these precedents, Penn Dairies, Inc. v. Milk Control Commission, 318 U.S. 261, 63 S.Ct. 617, —— L.Ed. —— (1943), it was asserted that Pennsylvania's regulation of the minimum wholesale price of milk on direct sales from suppliers to military establishments on commonwealth-owned land conflicted unconstitutionally with a federal procurement policy of competitive bidding. The Supreme Court initially noted that the Constitution empowered Congress to set aside state taxa-

tion and regulation of government contractors which burdens the federal government. In view of this power, it upheld the state's regulatory program, declaring that where Congress has not expressed a limitation, courts should not imply a constitutional restriction upon otherwise valid exercises of state power.

Mayo v. United States, *supra*, established as a corollary to federal immunity from state taxation, the principle that, without congressional approval, the functions of federal instrumentalities must be free of restrictive state regulation. *Mayo* invalidated Florida's regulatory quality controls on commercial fertilizer (which required each bag of fertilizer sold or distributed within the state to carry the label or stamp which evidenced payment of the state's inspection fee) as applied to fertilizers purchased by the United States Department of Agriculture and distributed to Florida farmers participating in a federal soil conservation program. This paragraph from the Court's opinion is especially significant here:

> These inspection fees are laid directly upon the United States. They are money exactions the payment of which, if they are enforceable, would be required before executing a function of government. Such a requirement is prohibited by the supremacy clause. We are not dealing as in Graves v. State of New York, etc., supra, with a tax upon the salary of an employee, or as in State of Alabama v. King & Boozer [*supra*] with a tax upon the purchases of a

> supplier, or as in Penn Dairies, Inc. v. Milk Control Comm. of Pennsylvania [*supra*], with price control exercised over a contractor with the United States. In these cases the exactions directly affected persons who were acting for themselves and not for the United States. These fees are like a tax upon the right to carry on the business of the post office or upon the privilege of selling United States bonds through federal officials. Admittedly the state inspection service is to protect consumers from fraud but in carrying out such protection, the federal function must be left free. This freedom is inherent in sovereignty. The silence of Congress as to the subjection of its instrumentalities, other than the United States, to local taxation or regulation is to be interpreted in the setting of the applicable legislation and the particular exaction. . . . But where, as here, the governmental action is carried on by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom continues.

Mayo v. United States, *supra*, 319 U.S. at 447-48, 63 S.Ct. at 1140-41 (citations and footnote omitted); *see* Leslie Miller, Inc. v. Arkansas, 352 U.S. 187, 77 S.Ct. 257, —— L.Ed.2d —— (1956); Johnson v. Maryland, 254 U.S. 51, 41 S.Ct. 16, 65 L.Ed. 126 (1920).

Paul v. United States, *supra*, overturned California's regulation of the minimum wholesale milk prices paid by vendee military clubs and post exchanges as antagonistic to revised armed services

procurement regulations. The Court concluded that the state's policy operated impermissibly there to eliminate competition.[22] *Penn Dairies* was distinguished on the basis of a change in federal procurement regulations. The regulations which were in effect when *Penn Dairies* was decided were considered to manifest a federal "hands off" policy regarding state minimum price legislation. On the other hand, the *Paul* court found that "[t]he present [revised] Regulation makes no such allowances, contains no such qualifications, and provides for no such exception. Its unqualified command is that purchases for the Armed Services be made on a competitive basis; and it has, of course, the force of law." 371 U.S. at 254-55, 83 S.Ct. at 433.

Neither *Paul* nor *Mayo* are apropos here. Clearly Mississippi has not interfered with competition between wholesale vendors of alcoholic beverages to the military. Regulation 25 does not fix any price nor does it constitute any form of minimum price regulation. It applies evenly to all wholesale sales across the board. Moreover, the Buck Act evinces congressional acquiescence to the state's taxing and regulatory scheme. Since the markup applies prorata to all wholesale liquor transactions, it does not alter the vendee's competitive purchase equation and thus is incapable of interfering in any substantial way with the armed forces' policy of competitive liquor pro-

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[22] *See* United States v. Georgia Public Service Commission, *supra*; Public Utilities Commission v. United States, 355 U.S. 534, 78 S.Ct. 446, 2 L.Ed.2d 470 (1958).

curement under "the most advantageous contract, price and other factors considered."

Neither has Mississippi legislated directly or indirectly so as to impair any function of these federal instrumentalities. The parties have stipulated that payment of the markup has not prevented profitable operation by the officers' clubs, ship's stores and post exchanges. Indeed, the military organizations, which are prohibited by Defense Department regulation from underselling local retailers by more than 10%,[23] are not only permitted to purchase their intoxicating liquors at wholesale prices, but also are exempt from the 2.50 dollars per gallon excise tax charged to private Mississippi retailers,[24] who must also collect from their customers the state's 5% sales tax from which vendees of the military clubs are exempt under the Buck Act.[25] The government has not asserted that enforcement of the markup compromises any federal military goal or function, or that the state has imposed insufferable conditions on the military affiliates which stifle their operations. Nor has the government contended that Congress intended to abrogate or subordinate the state's XXI

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[23] 32 C.F.R. § 261.5(b)(3)(ii) (1973).

[24] The parties have stipulated that other monopoly or control states collect a larger markup on military liquor purchases than Mississippi. Furthermore, California, a license state, collects an excise tax of 2.00 dollars per gallon of distilled spirits on all purchases by the military or by the United States, relying on the Buck Act.

[25] 4 U.S.C.A. § 107(a) (Supp. 1974).

Amendment regulatory authority over liquor to any valid federal military purpose. Only the vendor, in his individual capacity, is subject to state control. The government's complaint is based solely upon the fact that it must bear the economic incidence of the markup. The most that can be said is that Regulation 25 may reduce the military's profit margin from retail liquor sales. The slight weight of this economic factor does not tip the balance in favor of a military exemption from the reach of the XXI Amendment.

We reject the government's argument that the markup is void as incompatible with federal procurement policy and regulations under Paul v. United States, *supra*, or as an impermissibly inhibitive regulation of the valid functions of a federal military instrumentality under Mayo v. United States, *supra*. *See* James v. Dravo Contracting Co., *supra*.

III. *Conclusion*

Although the United States ultimately bears the economic burden of Mississippi's tax on the gross receipts from sales of liquor and wine by wholesalers and distillers, the legal incidence of the exaction is upon the seller. *James* v. *Dravo Contracting Company* and *King & Boozer*, *supra*, authorize this exaction. The constitutional balance between the war power decision of the United States to provide its armed forces personnel with low cost intoxicating beverages on Mississippi bases and the XXI Amend-

ment power of the State to regulate traffic in such commodities weighs in favor of the State. There being no discrimination against the federal government within the State's tax scheme,[26] any adjustment of the resultant intergovernmental tax consequences must come from the Congress.

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[26] *See, e.g.*, Moses Lake Homes, Inc. v. Grant County, 365 U.S. 744, 81 S.Ct. 870, —— L.Ed.2d —— (1961); Phillips Chemical Co. v. Dumas Independent School Dist., 361 U.S. 376, 80 S.Ct. 474, —— L.Ed.2d —— (1960); United States v. City of Detroit, *supra*.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

[Filed Jul. 12, 1974, Southern District of Mississippi, Robert C. Thomas, Clerk]

Civil Action No. 4554

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE TAX COMMISSION, ET AL., DEFENDANTS

JUDGMENT

By virtue of and pursuant to the opinion of the three-judge court in this case, which is adopted and made a part hereof by reference thereto, it is now ordered and adjudged by the Court that the claim of the United States in this case is without merit and that the complaint thereon should be and is in its entirety dismissed with prejudice without any assessment of costs.

ORDERED AND ADJUDGED, this July 12, A.D., 1974 by express authority of the other two judges on this panel, as managing judge herein.

/s/ [Illegible]
United States District Judge

A TRUE COPY, I HEREBY CERTIFY.
ROBERT C. THOMAS
Clerk

By: /s/ G. Burdett
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI
JACKSON DIVISION

[Filed Aug. 8, 1974, Southern District of Mississippi, Robert C. Thomas, Clerk]

Civil Action No. 4554

UNITED STATES OF AMERICA, PLAINTIFF

vs.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ARNY RHODEN, Chairman; JIMMIE WALKER, Excise Commissioner; WOODLEY CARR, Ad Valorem Commissioner; KENNETH STEWART, Director of the Alcoholic Beverage Control Division, Mississippi State Tax Commission; A. F. SUMMER, Attorney General, State of Mississippi; and the STATE OF MISSISSIPPI, DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on July 12, 1974.

This is an appeal from a final judgment, after notice and hearing, denying a permanent injunction in a civil action required by Section 2281, Title 28, United States Code, to be heard and determined by

a District Court of three judges, and this appeal is being taken under the provisions of Section 1253, Title 28, United States Code.

ROBERT E. HAUBERG
United States Attorney

By
/s/ Joseph E. Brown, Jr.
JOSEPH E. BROWN, JR.
Assistant United States Attorney

Attorney for the United States of America
Post Office Box 2091
Jackson, Mississippi 39205

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI
JACKSON DIVISION

(Civil Action No. 4554)

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ARNY RHODEN, CHAIRMAN; JIMMY WALKER, EXCISE COMMISSIONER; WOODLEY CARR, AD VALOREM COMMISSIONER; KENNETH STEWART, DIRECTOR OF THE ALCOHOLIC BEVERAGE CONTROL DIVISION, MISSISSIPPI STATE TAX COMMISSION; A. F. SUMMER, ATTORNEY GENERAL, STATE OF MISSISSIPPI, AND THE STATE OF MISSISSIPPI, DEFENDANTS

STIPULATION OF FACTS BETWEEN PLAINTIFF UNITED STATES OF AMERICA AND DEFENDANTS STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

The plaintiff United States of America and defendants State Tax Commission of the State of Mississippi, et al., herein stipulate that the following facts are true and correct, without prejudice to the right of any party to object to any of said facts as incompetent, immaterial or irrelevant evidence in this case:

1. Keesler Air Force Base, the United States Naval Construction Battalion Center, Columbus Air

Force Base, and the Meridian Naval Air Station are located in the State of Mississippi.

2. The four bases were purchased by the United States with the consent of the State of Mississippi.

3. The lands comprising Keesler Air Force Base at Biloxi and the United States Naval Construction Battalion Center at Gulfport, Mississippi were acquired in the following manner:

(a) *Keesler Air Force Base.* The main base, which comprises 1,061.92 acres, was acquired as follows: 717.20 acres by letter to Governor Fielding L. Wright from Harold C. Stuart, Assistant Secretary of the Air Force, dated April 19, 1950, and acknowledged April 24, 1950 (Exhibit 1); 344.72 acres by general blank letters of acceptance as follows: (1) letter to Governor Thomas L. Bailey from Henry L. Stimson, Secretary of War dated January 9, 1945, and acknowledged January 15, 1945 (Exhibit 2); (2) letter to Governor Thomas L. Bailey from Henry L. Stimson, Secretary of War, dated May 12, 1944, and acknowledged May 15, 1944 (Exhibit 3); (3) letter to Governor Paul B. Johnson from Henry L. Stimson, Secretary of War, dated May 26, 1943 and acknowledged June 1, 1943 (Exhibit 4).

(b) *U.S. Naval Construction Battalion Center.* The lands were acquired by Declaration of Taking filed by the Secretary of the Navy in the District Court of the United States for the Southern Division of the Southern District of Mississippi, as follows: (1) *United States of America* v. *911.50 acres, more or*

less, in Harrison County, Mississippi, G. B. Dantzler, et al., Civil No. 216, filed on April 30, 1942. Jurisdiction over this property was accepted on behalf of the United States by letter to Governor Paul B. Johnson from James Forrestal, Secretary of the Navy, dated December 14, 1942, and acknowledged December 29, 1942 (Exhibit 5); (2) *United States of America* v. *2.4 acres of land, more or less, in Harrison County, Mississippi, Mrs. Anna J. Ott, et al.*, Civil No. 224, filed on November 6, 1942. Jurisdiction over this land was accepted on behalf of the United States by letter to Governor Paul B. Johnson from James Forrestal, Secretary of the Navy, dated December 14, 1942 and acknowledged December 29, 1942 (Exhibit 6). (3) *The United States of America* v. *223 acres of land in Harrison County, Mississippi, Mrs. Gladys Finston, et al.*, Civil No. 285, filed on May 5, 1943. Jurisdiction was accepted by letter to Governor Dennis Murphree from Ralph A. Bard, Assistant Secretary of the Navy, dated January 6, 1944 and acknowledged January 9, 1944 (Exhibit 7).

4. Mississippi ceded to the United States and United States accepted concurrent jurisdiction over the lands comprising the Columbus Air Force Base and the Meridian Naval Air Station.

5. The Officers' Open Mess, Noncommissioned Officers' Open Mess, and the Airmen's Club of Keesler Air Force Base; the Officers' Open Mess and Noncommissioned Officers' Open Mess of Columbus Air Force Base; the Commissioned Officers' Mess—closed, Chief Petty Officers' Mess—open, Navy Exchange

Enlisted Men's Club of the United States Naval Construction Battalion Center; and the Chief Petty Officers' Mess—open, the Commissioned Officers' Mess—closed, the Commissioned Officers' Mess—open, the Navy Exchange Enlisted Men's Club, and the Centralized Package Store at Meridian Naval Auxiliary Air Station are all nonappropriated fund instrumentalities established in accordance with the pertinent regulations of the Air Force and the Navy.

6. Section 6 of the 1951 Amendments to the Universal Military Training and Service Act (50 U.S.C. App. 473) reads as follows:

> The Secretary of Defense is authorized to make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces or the National Security Training Corps at or near any camp, station, post, or other place primarily occupied by members of the Armed Forces or the National Security Training Corps. Any person, corporation, partnership, or association who knowingly violates the regulations which may be made hereunder shall, unless otherwise punishable under the Uniform Code of Military Justice, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000 or imprisonment for not more than twelve months, or both.

7. On May 4, 1964, the Secretary of Defense issued Department of Defense Directive 1330.15, which reads as follows:

Subject Alcoholic Beverage Control.
References:

(a) Section 6, 1951 Amendments to the Universal Military Training and Service Act, 50 U.S.C. App. 473.

(b) DoD Directive 1330.1, "Regulations for the Control of Alcoholic Beverages," December 17, 1953 (hereby cancelled).

(c) DoD Instruction 4175.2, "Purchase of Distilled Spirits for Resale by Military Installations which are Located in Monopoly States," April 19, 1956 (hereby cancelled).

I. AUTHORITY AND PURPOSE

Under the authority contained in reference (a) this Directive assigns responsibility and establishes uniform Department of Defense policy governing the sale of alcoholic beverages.

II. APPLICABILITY AND SCOPE

The provisions of this Directive apply to all DoD components and to all persons eligible to patronize on-base outlets selling alcoholic beverages in the United States and the District of Columbia.

III. RESPONSIBILITY

A. OFFICE OF THE SECRETARY OF DEFENSE

The Assistant Secretary of Defense (Manpower) (ASD(M)) shall be responsible for the administration of this Directive throughout the DoD.

B. MILITARY DEPARTMENTS

The Secretaries of the Military Departments shall be responsible for effectively carrying out the policies of this Directive and to make and issue implementing regulations in accordance with existing applicable laws.

IV. GENERAL POLICY STATEMENTS

A. USE OF ALCOHOLIC BEVERAGES

The established policy of the Department of Defense with respect to controlling the use of alcoholic beverages by members of the Armed Forces is to encourage abstinence, enforce moderation, and punish over-indulgence. This policy can be carried out most effectively through command supervision.

B. RESTRICTIVE CONTROLS AND AFFIRMATIVE MEASURES

1. Restrictive controls shall be established by Secretaries of the Military Departments which recognize (as the primary consideration) the varying conditions and requirements of military service, yet do not discriminate against individuals in the Armed Forces by denying them the rights and privileges of other citizens.

2. Affirmative measures shall be taken, including but not limited to providing (a) character guidance, with emphasis on the harmful effects of the immoderate use of alcoholic beverages, using the advice and assistance of chaplains, and (b) wholesome recrea-

tion, entertainment, and relaxation for individuals in the Armed Forces both on and off station, using the initiative and assistance of local communities and national organizations.

C. COOPERATION

1. DoD will cooperate with all duly constituted regulatory officials (local, state and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this Directive. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within the United States shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered, without regard to prices locally established by state statute or otherwise.

2. This policy of cooperation is not to be construed or represented as an admission of any legal obligation to submit to state control.

V. AUTHORIZED SALES

A. OTHER THAN PACKAGED ALCOHOLIC BEVERAGES

Appropriate regulations controlling the sale of alcoholic beverages dispensed by the drink, or beer sold in other than sales outlets for packaged alcoholic beverages, may be promulgated by the Secretaries of the Military Departments.

B. SALES OUTLETS FOR PACKAGED ALCOHOLIC BEVERAGES

The sale of packaged alcoholic beverages, other than beer, may be authorized on military installations when the Secretary of a Military Department approves the establishment of such sales outlets after determining that the authorization will be beneficial to the morale of the military community.

1. In arriving at such determinations, the Secretary of the Military Department will take cognizance of all pertinent factors including the following criteria as applicable:

(a) Estimated number of authorized patrons per outlet if granted.

(b) Importance of estimated contributions of package store profits to providing, maintaining and operating clubs, messes and other recreational activities.

(c) Availability of wholesome family social clubs to military personnel in the local civilian community.

(d) Geographical inconveniences.

(e) Limitations of non-military sources.

(f) Disciplinary and control problems due to restrictions imposed by local law and regulation.

(g) Highway safety.

(h) A digest of the attitudes of community authorities or civic organizations toward establishment of a package sales outlet.

2. An information copy will be dispatched to the ASD (M) of each action approving the establishment of sales outlets for packaged alcoholic beverages, including the determinations

and findings made in accordance with the criteria as stated above.

3. Controls

(a) Purchase and consumption

Although individual rationing will not be required, installation commanders will maintain a continuing review of the amount of alcoholic beverages purchased in the sales outlets and the number of authorized purchasers. If such review indicates that the purchases equated to the number of authorized individuals results in an excessive per capita amount, appropriate control measures will be instituted to assure compliance with Section IV.A or V.B.3.c. as applicable.

(b) Pricing

Prices in authorized sales outlets for packaged alcoholic beverages shall be within ten per cent (10%) of the lowest prevailing rates of civilian outlets in the area. Exceptions will be granted only upon approval by the Secretary of the cognizant Military Department upon a substantiated showing, to be made in each case, that special factors warrant an exception thereto.

(c) Diversion

Diversion, to authorized persons of packaged alcoholic beverages purchased by members of the Armed Forces in authorized sales outlets, is a serious offense and where substantiated will be punished.

4. Eligibility for patronage of sales outlets

Eligibility for patronage of sales outlets for alcoholic beverages on military installations will be restricted to authorized personnel prescribed by the Secretaries of the Military Departments.

VI. IMPLEMENTATION

Within thirty (30) days from the date of this Directive, the Secretaries of the Military Departments shall submit to the ASD (M) for approval their proposed implementing regulations.

VII. CANCELLATIONS

References (b) and (c) are cancelled.

8. On June 9, 1966, the following change 1 to Directive 1330.15 was issued:

The following pen change in DoD Directive 1330.15, 'Alcoholic Beverage Control,' May 4, 1964, has been authorized, *effective immediately*:

PEN CHANGE to *Page 2, Section IV.C.1*:

Delete the last clause reading as follows: 'without regard to prices locally established by state statute or otherwise.'

9. The following memoranda and letter are certified true copies from the official files of the Department of Defense relating to said Directive of June 9, 1966:

(a) Memorandum For Secretaries of the Military Departments from Thomas D. Morris, Assistant Sec-

retary of Defense (Manpower), dated April 15, 1966 (Exhibit 8);

(b) Memorandum For: Assistant Secretary of Defense (Manpower) from Robert H. B. Baldwin, Under Secretary of the Navy, dated April 22, 1966 (Exhibit 9);

(c) Memorandum For: Assistant Secretary of Defense (Manpower) from Arthur W. Allen, Jr., Deputy Under Secretary of the Army (Manpower), dated April 26, 1966 (Exhibit 10);

(d) Memorandum For The Assistant Secretary of Defense (Manpower) from Norman S. Paul, Under Secretary of the Air Force, dated April 26, 1966 (Exhibit 11);

(e) Memorandum for Mr. Morris from Stephen S. Jackson, dated May 3, 1966 (Exhibit 12);

(f) Memorandum for The Deputy Secretary of Defense from Thomas D. Morris, dated June 8, 1966 (Exhibit 13);

(g) Memorandum For The Assistant Secretary of Defense (Administration) from the Deputy Secretary of Defense, dated June 9, 1966 (Exhibit 14);

(h) Letter to Mr. Charles B. Buscher, Executive Director, National Alcoholic Beverage Control Association, from Thomas D. Morris, dated June 27, 1966 (Exhibit 15).

10. Mississippi's Local Option Alcoholic Beverage Control Law, Mississippi Code (1942) Annotated, Section 10265—01 *et seq.*, enacted July 1, 1966, a true copy of which is attached hereto as Exhibit 16, imposes regulatory control of alcoholic beverages within

the State and vests the administration of these provisions in the Alcoholic Beverage Control Division of the Mississippi State Tax Commission.

11. The Alcoholic Beverage Control Division promulgated Regulation No. 22 entitled "Sales to Military Post Exchanges, etc., Effective September 1, 1966", which reads as follows:

REGULATION NO. 22

SALES TO MILITARY POSTS EXCHANGES, ETC.
EFFECTIVE SEPTEMBER 1, 1966

Post Exchanges, Ship Stores and Officers Clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller, or by making purchases from the Alcoholic Beverage Control Division of the State Tax Commission. In the event that an order is placed by such organization directly with a distiller a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.

All orders of such organization shall bear the usual wholesale mark up in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller which shall in turn remit the wholesale mark up to the Alcoholic Beverage Control Division of the State Tax Commission.

The wholesale mark up on distilled spirits is 17%. The wholesale mark up on wine is 20%.

This was reissued, without substantial change in content, as Regulation No. 30, dated September 14, 1970.

12. The nonappropriated fund instrumentalities enumerated in Paragraph 6, hereof, elected to purchase all of their alcoholic beverages directly from distillers or suppliers. Under protest, but pursuant to Regulation No. 22 (now Regulation No. 30), they paid the aforementioned markups to the distillers and/or suppliers, and said distillers and/or suppliers collected the markups and remitted them directly to the Mississippi Alcoholic Beverage Control Division.

13. The Alcoholic Beverage Control Division maintains a wholesale warehouse for the distribution of alcoholic beverages as a service to purchasers. The wholesale services and facilities are available both to the military and other purchasers. The Division is required by law to maintain these facilities whether they are utilized or not. In instances where the nonappropriated fund instrumentalities listed in Paragraph 6, hereof, make purchases of alcoholic beverages direct from distillers located outside the State of Mississippi with shipment being made direct to said organizations, the Division does not transport, store, distribute or perform any other direct service connected with the purchases.

14. By letter dated May 23, 1967 addressed to "All Firms Selling Alcoholic Beverages to the State

of Mississippi," the Mississippi Alcoholic Beverage Control Division informed such firms as follows:

Subject: Sales to Military Post Exchanges, Ship Stores and Officers Clubs.

You are hereby advised that the following Regulation issued under authority granted by HB 112, laws of 1966, *has not been suspended or amended*, therefore, all provisions remain in force and shall be strictly adhered to:

REGULATION NO. 22

SALES TO MILITARY POST EXCHANGES, ETC. EFFECTIVE SEPTEMBER 1, 1966

Post Exchanges, Ship Stores and Officers Clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller, or by making purchases from the Alcoholic Beverage Control Division of the State Tax Commission. In the event that an order is placed by such organization directly with a distiller a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.

All orders of such organization shall bear the usual wholesale mark up in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller which shall in turn remit the wholesale mark up to the

Alcoholic Beverage Control Division of the State Tax Commission.

The wholesale mark up on distilled spirits is 17%. The wholesale mark up on wine is 20%."

Any supplier who fails or refuses to strictly observe the above Regulation shall be considered as having violated the Alcoholic Beverage Control laws of Mississippi and promptly deprived of the benefits of same; and in addition thereto may be prosecuted for violating the act and subject to the penalties set forth therein.

Submitted by:

/s/ A. V. Beacham, M.D.,
A. V. BEACHAM, M.D., *Director.*

cc: Commanders of Military Posts located in Mississippi

(Underscoring so in original).

15. By letter dated June 8, 1967, addressed to "Alcoholic Beverage Suppliers", on the subject of "Compliance With Alcoholic Beverage Control Regulation No. 22—Sales To Military Officers Clubs, Post Exchanges, Ships Stores, Etc.," the Mississippi Alcoholic Beverage Control Division informed such suppliers as follows:

Gentlemen: The mark-up regulatory fee required by the subject regulation must be remitted directly to this Division on the date shipments are made to the Military base. Said fee

must be invoiced to the Military and collected directly from the Military (Club) or other authorized organization located on the Military base. Any supplier who ships or sells alcoholic beverages to Military organizations located within the boundaries of Mississippi without immediately remitting the fee directly to the Alcoholic Beverage Control Division of the State Tax Commission and collecting said fee directly from the said Military organization shall be in violation of the Alcoholic Beverage Control laws and regulations issued pursuant thereto. Payments by the Military organizations into an escrow account in lieu of payment to the suppliers have not been approved by the State of Mississippi and any such payments permitted by the suppliers shall subject such suppliers to penalties as provided by law and regulations. In addition to penalties imposed by law, products presently sold by the Alcoholic Beverage Control Division *will be delisted.*

If this letter is not completely and perfectly clear we strongly suggest that you contact this office prior to accepting further orders.

Yours very truly,

/s/ A. V. Beacham, M.D.,
A. V. BEACHAM, M.D., *Director,*
Alcoholic Beverage Control
Division,
State Tax Commission.

AVB:am

(Underscoring so in original).

16. The Alcoholic Beverage Control Division initially sought to require the said nonappropriated fund instrumentalities to obtain an alcoholic beverage permit from the Division as a condition to purchasing and selling alcoholic beverages in the State of Mississippi. After their refusal to obtain such permits, the Division made no further effort to enforce this requirement.

17. The amount of the markups paid by the affected nonappropriated fund instrumentalities to suppliers outside the State of Mississippi and remitted by them to the Mississippi Alcoholic Beverage Control Division has totalled $648,421.92 from September 1966 through July 31, 1971.

18. The following Directives, Regulations and Manuals govern the operation of the clubs and other nonappropriated fund instrumentalities of the Air Force and Navy:

Department of Defense Directive No. 1330.15 dated May 4, 1964, as revised June 9, 1966, and applicable to the nonappropriated fund instrumentalities of all military departments (Exhibit 17);

Air Force Regulation 34-57, dated December 22, 1970, entitled, The Control of Alcoholic Beverages: Their Procurement, Sale and Use, with Change 1, dated March 25, 1971 (Exhibit 18);

Air Force Regulation 176-1, dated July 30, 1968, entitled, Nonappropriated Funds: Basic Responsibilities, Policies, and Practices, with Changes 1, 2, 3, 4, 5, 6, and 7 (Exhibit 19);

Air Force Manual 176-3, dated May 12, 1971, entitled Nonappropriated Funds: Operational Manual for Open Messes and Other Sundry Associations (Exhibit 20);

Navy regulations contained in the Manual for Messes Ashore, 1962, with Changes 1 through 6 (NAVPERS 15951) (Exhibit 21.).

19. The net profits earned by the aforesaid nonappropriated fund instrumentalities listed in Paragraph 6 of this stipulation, from the sale of alcoholic beverages for the calendar year 1969 and fiscal year 1971, and the use made thereof, were as follows:

(1) *Keesler Air Force Base*: Officers' Open Mess: 1969—$51,542.10; 1971—$12,554.78. Used for general maintenance of the club. NCO Open Mess: 1969—$55,348.55; 1971—$20,684.08. Used for general maintenance of the club and purchase of equipment.

(2) *Columbus Air Force Base*: Officers' Club: Fiscal year 1970, with beer sales included, $11,732.62; 1971—$12,654.43. Used for general maintenance of the club. NCO club: 1969—$23,241.23. Used for the general maintenance of the club. 1971—$15,864.87. Put into special reserve fund for major improvements and decorations.

(3) *U.S. Naval Construction Battalion Center*: Commissioned Officers' Mess—closed: 1971—$1,977; Chief Petty Officers' Mess—open: 1971—$17,048. Put into clubs' reserve funds and used for additions and improvements to the clubs. Enlisted Mens' Club: 1969—$12,385; 1971—Enlisted Mens' Club (Package store), $8,113; Enlisted Mens' Club (Bar sales),

$20,027. Profits were held for the club for entertainment, refurbishment and similar purposes for improving the club.

(4) *Naval Air Station, Meridian*: Enlisted Mens' Club: 1969—$12,385; 1971—Enlisted Mens' Club (Package store), $4,370; Enlisted Mens' Club (Bar sales), $12,838. Profits are held for the club for entertainment, refurbishment and similar purposes for improving the clubs; CPO Mess: 1969—$4,755.29; 1971—$6,204. Profits used to help pay wages and other mess administrative expenses; Commissioned Officers Mess—open: 1969—$14,154.45; 1971—$8,-620. Put in club's reserve fund and used for additions and improvements to the club.

21. The following Interrogatories to the Plaintiff and the Plaintiff's Answers thereto:

> "5. What, if any, reason exists why the personnel at the four military bases named in paragraph 6 of the complaint cannot supply their legitimate needs for packaged liquor by purchases from retail stores licensed by the State of Mississippi?
>
> Answer. The nature and characteristics of military service and the circumstances and conditions governing such service cause Armed Forces personnel and their families to form their own community on the military installation and to remain separated from the surrounding civilian community. Members of the Armed Forces are subject to military discipline. Their place of duty assignment and hours of duty are fixed on the basis of the needs of the

service and not upon personal preferences of the individual. Because they share the same outlook and the same working and living conditions, Service families look to each other and to the installation to which they are assigned for the satisfaction of their duty and off-duty needs.

The clubs, including their packaged liquor stores, furnish a necessary and important service to Armed Forces personnel and their families. They provide convenient facilities for off-duty dining, entertainment, relaxation and amusement. To the military community, they are the counterparts of similar facilities that are available to civilians in the civilian community.

Because they are conveniently located, are oriented to the special needs and circumstances of Service families, and are a particular earmark of military life, they contribute to the establishment and maintenance of Service morale and esprit de corps."

"6. What if any, reason exists why the alleged Federal instrumentalities named in paragraph 6 of the complaint cannot supply the legitimate needs of the aforesaid personnel without avoiding payment of the wholesale markup on packaged liquor required by the State of Mississippi as to all packaged liquor sold in the State?

Answer: Members of the Armed Forces are stationed at installations and transferred therefrom as the needs of the Service dictate, and not on the basis of personal preferences. Because of these circumstances, it is desirable from

a morale standpoint that each installation furnish substantially similar off-duty facilities for its military community, including clubs, packaged liquor stores, etc. This policy aids in easing the burden and inconvenience of transfers of personnel from one installation to another.

The 17 or 20 per cent wholesale mark up on liquor in Mississippi has a substantial effect on the price at which it can be sold on the installation. No other State has such a requirement. If the wholesale mark up is paid by clubs at installations in Mississippi, their resale prices would be higher than at clubs located on installations in other States throughout the country. It would be one factor which would make service at installations in Mississippi less attractive than in other States and would detrimentally affect the morale of Armed Services personnel transferring to installations in the State of Mississippi."

/s/ Meyer Scolnick
MEYER SCOLNICK
Attorney for the Plaintiff, United States of America.

/s/ Guy N. Rogers
GUY N. ROGERS
Assistant Attorney General for the State of Mississippi.

/s/ Robert L. Wright
ROBERT L. WRIGHT
Attorney for Defendant, State Tax Commission of the State of Mississippi.

APPENDIX E

[State Emblem]

ALCOHOLIC BEVERAGE CONTROL DIVISION
STATE TAX COMMISSION

Jackson, Mississippi 39205

Uree Garner, Director
A. B. C. Division

Telephones:
Central Office 354-6282
Warehouse 354-6235

August 8, 1973

Commanding Officer
Keesler Air Force Base
Building 1404
Biloxi, Mississippi

Dear Sir:

Attached is a copy of a memorandum regarding the Mississippi Alcoholic Beverage Control Division Regulation No. 25. This memorandum has been sent to the vendors from whom merchandise is purchased for the State of Mississippi.

I am going to request that you inform your purchasing personnel of the contents of my memorandum to the vendors and will ask that they follow the instructions contained therein.

Thank you very much for your cooperation in this matter.

Very truly yours,

/s/ Uree Garner
Uree Garner, Director
Alcoholic Beverage
Control Division

UG/sdh
Enclosures

[State Emblem]

ALCOHOLIC BEVERAGE CONTROL DIVISION
STATE TAX COMMISSION
Jackson, Mississippi 39205

Uree Garner, Director
A. B. C. Division

Telephones:
Central Office 354-6282
Warehouse 354-6235

8 August 1973

TO: ALL VENDORS

ATTENTION: CONTROL STATE MANAGERS

FROM: UREE GARNER

SUBJECT: REGULATION NO. 25 "SALES TO MILITARY POST EXCHANGES, ETC.

Attached is a copy of Regulation No. 25. Your attention is called to the option given to post exchanges, ship stores, and officers' clubs operated by military personnel (including those operated by the National Guard). The choice is granted to the purchasing direct from the *distiller* or from the Alcoholic Beverage Control Division of the State Tax Commission. Purchases are not to be placed with any other source.

/s/ Uree Garner
Uree Garner, Director
Alcoholic Beverage
Control Division

UG/sdh

APPENDIX F

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATION INVOLVED

1. Article I, Section 8, of the United States Constitution provides in part:

> The Congress shall have Power * * *
>
> To raise and support Armies, * * *
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> * * * *
>
> To exercise exclusive Legislation in all Cases whatsoever * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings * * *.

Article IV, Section 3, provides in part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *.

Article VI provides in part:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing

in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Twenty-first Amendment provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

2. Section 105(a) of the Buck Act, 61 Stat. 644, 4 U.S.C. 105(a), provides:

> No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

Section 107(a) of the Act, 61 Stat. 645, as amended, 4 U.S.C. 107(a), provides:

> The provisions of sections 105 and 106 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any in-

strumentality thereof to any authorized purchaser.

Section 110 of the Act, 61 Stat 645, 4 U.S.C. 110, provides in part:

> As used in sections 105-109 of this title—
>
> (a) The term "person" shall have the meaning assigned to it in section 3797 of title 26.
>
> (b) The term "sales or use tax" means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except a tax with respect to which the provisions of section 104 of this title are applicable.
>
> * * * *
>
> (e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency, of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State.

3. Section 10265-18(c) of the Mississippi Local Option Alcoholic Beverage Control Law, 7A Miss. Code 1942 Ann. (1972 Cum. Supp.) 10265-18(c), provides:

> The State Tax Commission is hereby created a wholesale distributor and seller of alcoholic beverages, not including malt liquors, within the State of Mississippi. It is granted the sole right to import and sell such intoxicating liquors at

> wholesale within the State, and no person who is granted the right to sell, distribute, or receive such liquors at retail shall purchase any such intoxicating liquors from any source other than the Commission. The said Commission may establish warehouses, purchase intoxicating liquors in such quantities and from such sources as it may deem desirable and sell the same to authorized retailers within the State including, at the discretion of the Commission, any retail distributors operating within any military post or qualified resort areas within the boundaries of the State, keeping a correct and accurate record of all such transactions, and exercising such control over the distribution of alcoholic beverages as seem right and proper in keeping with the provisions and purposes of this act. * * *

Section 10265-106 of the Mississippi Local Option Alcoholic Beverage Control Law, 7A Miss. Code 1942 Ann. (1972 Cum. Supp.) 10265-106, provides in part:

> The Commission shall add to the cost of all alcoholic beverages such various markups as in its discretion will be adequate to cover the cost of operation of the State wholesale liquor business, yield a reasonable profit, and be competitive with liquor prices in neighboring states.

4. Regulation 25 of the Mississippi State Tax Commission provides:

> Post exchanges, ship stores, and officers' clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the

distiller or from the Alcoholic Beverage Control Division of the State Tax Commission. In the event an order is placed by such organization directly with a distiller, a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.

All orders of such organizations shall bear the usual wholesale markup in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller, which shall in turn remit the wholesale markup to the Alcoholic Beverage Control Division of the State Tax Commission monthly covering shipments made for the previous month.

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